FILED
JUL 25 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 168.

PARTENREEDEREI "WALLSCHIFF,"
owner of the
M/V WALLSCHIFF,
and
AMERICAN SEATING COMPANY OF
HARTFORD, CONNECTICUT, *et al.*,
Petitioners,
vs.
THE STEAMER PIONEER,
and
THE CLEVELAND CLIFFS IRON COMPANY,
as bareboat chartered owner of the
STEAMER PIONEER,
Respondents.

BRIEF FOR THE RESPONDENTS
In Opposition to the Petition for Writ of Certiorari.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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Respondents.

BRIEF FOR THE RESPONDENTS
In Opposition to the Petition for Writ of Certiorari.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether, in construing the Canadian rule of proportionate fault in maritime collisions this Court, in the absence of a showing that the apportionment made by the Trial Court is arbitrary or capricious, should decline to interfere with that apportionment as approved by the Court below.

COUNTER-STATEMENT OF FACTS.

On the date of the collision the Pioneer, a conventional Great Lakes bulk carrier loaded with a cargo of iron ore, was downbound in the St. Clair River. The Wallschiff, a motor vessel of German registry, was upbound laden with a partial cargo of steel sheets and was on her maiden Great Lakes voyage.

The following findings of fact of the Trial Court were based upon conflicting evidence, with substantial reliance being placed upon the testimony of an unusual number of outside disinterested witnesses which supported, in its important and relevant details, the account of the accident given by the crew of the Pioneer:

"At a time when the Pioneer was one-half mile or more upstream from the Wallschiff, the Pioneer's Master observed the Wallschiff coming upstream to and about one hundred feet from the American shore. The downbound Pioneer, when well within the required distance, exercised its right of election to make a starboard-to-starboard passage and sounded a two-blast passing signal to the upbound Wallschiff. The Pioneer got no response from the Wallschiff, and the Wallschiff continued its parallel course along the American shore." (Appendix A, 23a.)

"After a lapse of about thirty seconds, following the first two-blast signal, the Pioneer, in the absence of a response from the Wallschiff, sounded a danger signal for the purpose of alerting or waking up the Master of the Wallschiff. The danger signal was followed by a second two-blast signal. At about the time of the sounding of the second two-blast signal and when a distance of approximately twelve hundred feet separated the boats, the Wallschiff suddenly and without warning swung or sheered to starboard and headed across the river at about a forty-

five degree angle. The Pioneer had been continuing its course to port and, when the Wallschiff changed her course, swung hard over to port."

"The Pioneer did not reduce her speed, reverse her engines, or change her wheel from hard aport until she was approximately two hundred feet from the Wallschiff, at which time the wheel was put amidships and the engines were reversed. This, however, made no appreciable change in the speed of the Pioneer and she struck the Wallschiff aft of amidships, the angle of collision being approximately ninety degrees. * * *" (Appendix A, 23a, 24a.)

"Prior to the crossing the river at a forty-five degree angle, the Wallschiff was navigating close to and parallel with the American shore. From the time the Pioneer observed the Wallschiff until the time of that vessel's sudden and inexcusable sheering across the river, both vessels were in safe position to pass if the Wallschiff had not sheered across the bow of the Pioneer. The collision could not have occurred had the Wallschiff continued on the course it was proceeding on when it first received the two-blast signal and had it given any heed to such signal, to the danger signal, or to the second two-blast signal." (Appendix 25a.)

"The Pioneer was not guilty of negligence or fault in what the Master of that vessel did, or failed to do, from the time the Wallschiff started its abrupt course to its starboard, nor is the Pioneer guilty of contributory fault because of the failure to drop its anchors."

"The Wallschiff was not being navigated with the care that the situation at hand called for and the collision was caused, primarily, by the conduct of the Wallschiff. The faults of the Wallschiff were so gross that, under the comparative negligence rule, she is chargeable with and

responsible for ninety-five percent of the total provable damages sustained by both vessels." (Appendix A, 26a.)

"* * * The silence of the Wallschiff upon receiving the first two-blast signal from the Pioneer should have placed the Master of the Pioneer in some doubt. It was not necessary for him to immediately, upon failure to get a responsive signal, reverse his engines and reduce his speed. It cannot be said with mathematical nicety how many seconds a Captain should wait for an answering signal. Thirty seconds, however, without action followed by a danger signal, still without action and without full assurance of a safe passage, persuades this Court that he cannot completely exonerate Captain O'Leary of fault." (Appendix A, 25a.)

"* * * The Pioneer's fault was not at all of the character or gravity of that of the Wallschiff, and under the same rule of negligence, she is chargeable with and responsible for five percent of the total provable damages sustained by both vessels." (Appendix 25a, 26a.)

The Trial Court concluded that "The collision was due, primarily, to the faults of the M/V Wallschiff, which were major and inexcusable. The fault of the Steamer Pioneer was minor and contributed in only a slight degree to the collision." (Appendix A, 27a.)

The District Court's view concerning the disparity in the faults of the two vessels is best expressed in the following language contained in its Opinion:

"* * * This Court is not impressed, however, that the Pioneer's fault was at all of the character or gravity of that of the Wallschiff, but it cannot be eliminated entirely. Some Court might find that the Pioneer's fault was so minimal and the Wallschiff's so gross as to cast the entire burden of fault upon the Wallschiff. With the opportunity

here to apportion damages, this Court does not feel that it should do so * * *."

* * * * *

"If the American rule had to be applied in this case, with equal division of the damages, this Court might, indeed, imitate many of its predecessors and seek to avoid injustice by excusing the Pioneer under the major-minor fault doctrine. Being constrained to find there was some violation of Rule 26, *supra*, by the Pioneer's master, this Court is grateful for the circumstances that this collision happened in Canadian waters." (Appendix A, 19a.)

The *per curiam* action of the Court below was an affirmance based upon the reasons stated in the findings of fact, conclusions of law and opinion of the District Court. The order of the United States Court of Appeals, denying the petitioner's petition for rehearing *en banc* constituted a reaffirmance of the District Court's findings and conclusions. (Appendix A, 33a, 34a.)

ARGUMENT.

POINT I.

This case does not involve an important question of federal law. The issues involved are ones of fact on which both lower courts have ruled adversely to the petitioners. The allocation of fault by the Trial Court will not, except in rare instances, be disturbed by an appellate tribunal.

The petitioners, in requesting this court to review the record in a marine collision case and to substitute its judgment for that of the two lower courts on issues of fact are faced with the familiar principle that findings of fact, concurred in by the lower tribunals will be accepted unless clear error is shown. As was succinctly said in *Magnum Co. v. Coty*, 262 U. S. 159, 163:

> "* * * The jurisdiction (certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. * * *"

Adherence to the above mentioned principle in maritime cases has been uniform. In *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 145 this Court states:

> "The owners contend that both lower courts erred in holding that the steamer was unseaworthy at this commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. *The Wildcroft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658."

As is the situation in most collision cases the findings of fact here were based upon conflicting evidence. The

background of the resolving of that conflict is thus stated by the District Court (Appendix A, 5a):

> "The Court is satisfied from all of the evidence that the principal and major fault in this case was that of the Wallschiff. Aside from the weight, or lack of it, which this Court finds in the conflicting evidence of the members of the respective crews, the Court is greatly helped by the testimony of disinterested eyewitnesses along the Michigan shore who had an opportunity to observe the movements of the boats in question and to hear the signals given during the time the boats were approaching each other prior to and at the time of the collision. Not all of the outside witnesses corroborated the testimony of the crew of the Pioneer. A witness who was on the porch of the Westcott Marine Reporter Station on the Port Huron shore, and a witness who was on the Canadian shore gave testimony which tended to support the account of the crew of the German boat. The Court is satisfied, however, that the record will fully justify his conclusion that they lacked sufficient credibility to seriously detract from the weight the Court is giving to the other disinterested witnesses. There are discrepancies as to time, distances and other details between the account of the various disinterested witnesses produced by the Pioneer, but in the main, their testimony heavily supports the broad picture of the events as given by the members of the crew of the Pioneer and its master."

The facts which the Trial Court found are fully supported by the record. Its conclusions, based upon those facts, are in accord with applicable legal principles. The findings and conclusions have received the unqualified approval of the Court below. No significant reason has been advanced why this Court should depart from its time honored refusal to review the evidence.

The petitioners urge that the time has now come for this Court to pass on the principles governing the Canadian proportionate fault rule. What they are, in effect, asking is that this Court chart the course for the lower courts so that in a given situation they will know how to allocate the faults, percentage-wise, of the respective vessels. They are not only requesting this Court to accomplish the impossible but their argument is contrary to the rulings of the English and Canadian courts which have had long and varied experience in dealing with this very principle. Those courts recognize that no two cases are alike; that each must be decided on its own facts as far as percentages of fault are concerned and that precedents are of little or no value. They further are of the view that inasmuch as the allocation of fault necessarily involves the delicate weighing of multiple considerations only exceptional circumstances will justify a revision by an appellate court of the trial court's apportionment of blame.

The House of Lords has pointed out that where an appellate court has accepted the trial court's findings of fact that two ships in collision were both to blame, it will be entitled, in only very exceptional circumstances, to revise the apportionment of liability which the trial court has made. In *The Macgregor,* Times Law Reports, Vol. 59 (1942) 61, 62, the Lord Chancellor said:

> "* * * It seems to me that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judges. * * * I apprehend that if a number of different reasons were given why one ship is to blame, but on examination some of these reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden.

If there were a case in which the Judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be I think—a reason for considering whether there should be a change made on appeal. But, subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare."

Lord Wright had the following to say in concurring with the Lord Chancellor (p. 62):

"It seems to me that these observations of three very eminent Judges are quite in accord with what was said in *The Umtali* (*supra*), and with what the Lord Chancellor has just said. I do not say, any more than they did, that under proper conditions, such as those indicated by the three members of the Court of Appeal in The Karamea (*supra*), the Judge's apportionment might not be interfered with by an appellate Court, *but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the Courts have warned an appellate Court against interfering, save in very exceptional circumstances, with the Judge's apportionment.* The accepted rule was clearly stated by Lord Buckmaster, with the assent of the other Lords, in

> *The Otranto* (47 The Times L. R. 163, at p. 166; [1931] A. C. 194, at p. 204), in these words: '*Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the Judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.*' " (Emphasis supplied.)

Even if it were assumed, *arguendo,* that no Canadian court has made a more divergent apportionment than 75/25%, that would not constitute a persuasive reason why the Trial Court in the instant case should not have made the apportionment which it did or why that apportionment should be disturbed by this Court. It necessarily rests with the trier of facts to translate the degrees of fault into percentages and, assuming that the apportionment is not arbitrary or capricious who is to say, in a given case, that a 90/10% or any other apportionment would be a more just result than 95/5%.

The petitioner has referred to decisions of the British and Canadian courts (Petition p. 8). There are others where the apportionment closely approximates the one at bar. In *The Hartlepool,* 62 Ll. L. Rep. 117 (Admiralty Division 1938) the apportionment was 90/10% and in *The Atlanticos,* 75 Ll. L. Rep. 160 (Admiralty Division 1943) the apportionment made by the Court was five sixths and one sixth. It seems obvious that each case must stand on its own feet as far as apportionment of fault is concerned and that precedents cannot be controlling. Although such a result would admittedly require fine sighting there is no sound legal reason, if the facts justify it, why an apportionment, under the comparative negligence rule as incorporated in the Canada Shipping Act of 1934, could not be on the basis of 99/1%.

The anticipated increase in traffic on the Great Lakes because of the advent of the St. Lawrence Seaway does not,

as suggested by the petitioners, increase the importance of the issue involved. Such collisions as do occur will have to take place in Canadian waters, irrespective of the nationality of the vessels, before the proportionate fault rule will be applicable and if the past is any guide to the future our courts will be applying the American rule of mutual fault and divided damages in most of the litigated cases. We suggest, in that connection, it is highly significant, that, in spite of the heavy traffic on the Great Lakes, both before and after the completion of the Seaway and the substantial number of collisions which have occurred, this is the first case in which the intervention of this Court has been sought to interpret the meaning of a principle of collision law foreign to this jurisdiction and to supply the ground rules for application to specific cases. In the rare instances where the issues are likely to arise the District Courts and the Circuit Courts of Appeal are fully qualified to deal with them on a fair and an equitable basis.

POINT II.

The primary cause of the collision was the sudden inexcusable turning or sheering of the Wallschiff across the river and across the bow of the Pioneer. In comparison, the fault of the Pioneer was so slight that complete exoneration under either American or Canadian law would have been justified. There is no conflict between the decision below and the ones upon which the petitioners rely.

Prior to crossing the river at a forty-five degree angle the Wallschiff was navigating close to (approximately 100 feet) and parallel with the American shore. From the time the Pioneer observed the Wallschiff until the time of that vessel's sudden and inexcusable sheering across the river, both vessels were in a safe position to pass, if the Wallschiff had not sheered across the bow of the Pioneer.

The collision could not have occurred had the Wallschiff continued on the course she was proceeding on when she received the two-blast signal and had she given any heed to that signal, to the danger signal, or to the second two-blast signal. From the moment the Pioneer began the swing to her left, and this was before the Wallschiff started across the river, she was proceeding on a course away from the course on which the Wallschiff was proceeding prior to that vessel's sharp turn to her right, and, in the absence of that right turn, the collision would not have occurred.

There is complete justification for the conclusions of the Courts below that the "principal and major fault in this case was that of the Wallschiff and that it was grave and inexcusable." (Appendix A, 14a.)

American courts, on numerous occasions, have condemned vessels, in full, where they have departed from their courses into the paths of oncoming steamers.

See:

Minnesota S. S. Co. v. Lehigh Valley Transportation Co., 129 Fed. 22, 24 (C. C. A. 6);

The William Chisholm, 153 Fed. 704, 713 (C. C. A. 6);

Graham v. Standard Wholesale Phosphate etc., 181 F. (2d) 50, 52 (C. C. A. 4);

In re Rend, 126 Fed. 564 (D. C. Minn.).

The Canadian courts are in complete accord on the proposition that the unwarranted attempt on the part of one vessel to cross the bows of an approaching steamer is enough to make the former solely liable. In *The Cavelier v. Liverpool Shipping Company*, 1931 Ex. C. R. 205, the collision occurred in Halifax Harbor with the bow of the Cavelier striking the Kenny on her starboard quarter.

The Kenny, prior to the collision, had suddenly altered her course to port and had attempted to cross the bow of the other vessel. The Trial Court found both vessels at fault. In reversing and ruling that the Kenny was solely to blame the Appellate Court stated (pp. 214, 215):

> "Previous to the time the Kenny altered her course, both vessels were travelling in opposite directions, each showing her red lights. While in that position, the master of the Kenny, without signalling, changed his course to port, against the strict inhibition of such course provided by the rules of the road and aggregated his manoeuvre by admitting in his evidence that he did not look at the Cavelier immediately before altering his course."
>
> "I have come to the conclusion that the master of the Kenny has violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road. There was no justification for altering his course under the circumstances, and much more so without any signal to the other vessel of such intention, and that he is guilty of mismanagement and bad seamanship. This manoeuvre was erratic and devoid of any seamanship. He created the danger of collision, placed the Cavelier in the agony of collision while the latter has shown all through good seamanship and has done all in her power to avoid this collision."
>
> "The Kenny is solely to blame for the collision; she should not have attempted to cross the bow of the Cavelier under the circumstances. The appeal is allowed with costs both before this Court and before the trial judge."

Also see:

Bryde v. The Montcalm, 1913 A. C. 472; 19 Ex. C. R. 156;

The Cuba v. Ronald McMillan et al., 26 S. Ct. of Canada Reports 651.

The only fault which the Courts below found against the Pioneer was the failure of Captain O'Leary to reverse his engines during the thirty-second interval between the first two-blast passing signal and the danger signal which were sounded to the Wallschiff. This, those Courts said, constituted *some* violation of Rule 26, which charged him with *some responsibility, however slight*, for the collision. (Appendix A, 15a.) The navigation of the Pioneer was otherwise approved. (Appendix A, 16a.)

It is abundantly clear that the Courts below considered that the faults of the Wallschiff were sufficient, in and of themselves, to account for the collision. Even assuming the existence of a technical violation of Rule 26 by the Pioneer, it is clear that the failure to strictly comply with its requirements was a "condition" and not a "cause" of the collision. The operation of that doctrine is set forth in the following language contained in *The Perseverance*, 2 Cir., 63 F. (2d) 788, at p. 790:

> "As to the ship, we are disposed to exonerate her, though she was at fault as we have said. We accept the common form of statement that the fault must be a 'cause,' not a 'condition,' of the collision. By that, as we said in The Socony No. 19, 29 F. (2d) 20, we mean that although the fault was a cause, in the sense that it was a part of those circumstances necessary to the occurrence, the tug was amply advised in advance of the ship's position, and could have avoided her by proper navigation. * * *"

Also see:

The Syosset, 2 Cir., 71 F. (2d) 666;
The Clara, 2 Cir., 55 F. 1021, 1023.

The failure to reverse may have been "part of the circumstances necessary to the occurrence," but as a "cause" of the collision it pales into insignificance when compared with the sudden, unwarranted and unexpected

alteration of the course of the Wallschiff. The disparity between the faults is self-evident. It is, we submit, accurately reflected by the allocation, percentage-wise, made by the District Court and approved by the Court below.

In assessing fault against the Pioneer the Trial Court cited and quoted from the very decisions which the petitioners now suggest are in conflict with the rulings below. (Appendix A, 17a-19a.)

In *The New York*, 175 U. S. 187, this Court applied the American doctrine of mutual fault and divided damages to a factual [illegible] where the respective vessels were of equal gravity. This is a far cry from the instant case where a construction of the comparative negligence rule is involved and where, after a painstaking evaluation of all of the circumstances by the Court charged with that responsibility, the conclusion was reached that the Pioneer's fault contributed in only a slight degree to the collision. The circumstances surrounding each collision are different and we submit this Court in *The New York*, *supra*, did not intend that the apportionment of fault contained therein should apply to all factual situations.

There is a similar absence of conflict with the other decision upon which the petitioners rely. The Courts below quoted from *A. H. Bull S. S. Co. v. United States*, 34 F. (2d) 614, 616 (C. C. A. 2), in connection with the duty of a master to promptly take action in failing to receive a responsive signal but their refusal to impose a 50% liability on the Pioneer does not create a variance which this Court must resolve. The ruling of mutual fault and divided damages in the *Bull* case, *supra*, was based upon a specific finding that the collision would have been avoided had the speed of one of the vessels been seasonably reduced. In that connection the Court said (p. 616):

"* * * Had the Clare done her duty shortly after her first signal—that is as soon as she was in doubt as to the Chinook's navigation—this collision would not have happened. If she had done it as soon as the Chinook began to swing upon her course, it probably would not have happened. * * *"

The Trial Court in the case at bar did not conclude that if the Master of the Pioneer had attempted to reduce his speed, the collision would have been avoided. In that connection it made the much softer statement that it could not have been avoided had Captain O'Leary been earlier concerned and had he taken steps to reduce the speed of his vessel, the collision would, nevertheless, have occurred or that it would have as severe as it was. (Appendix A, 18a.)

POINT III.

The Pioneer's first two-blast passing signal to the Wallschiff was sounded before the vessels were within one-half mile, in full compliance with the Great Lakes Pilot Rules.

The Trial Court found that "At a time when the Pioneer was over one-half mile upstream from the Wallschiff, the Pioneer's master observed the Wallschiff coming upstream close to and about one hundred feet from the American shore; * * * that while still better than one-half mile away, the captain sounded a two-blast passing signal * * *." (Appendix A, 62.)

In that connection the Trial Court also said:

"* * * As to the distance the Pioneer was when they blew the first blast, there are varying statements of its location at that time, but they all did indicate that the Pioneer was coming under, or coming out from under the Blue Water bridge. This would corroborate the Master's testimony that he was more than one-half

mile away from the Wallschiff when he blew his first passing signal * * *." (Appendix A, 12a.)

The sounding of the above mentioned signal was in complete compliance with Great Lakes Pilot Rule 24 (Appendix A, 36a). It also indicated, without question, that Captain O'Leary had the Wallschiff under observation and that his handling of the Pioneer from that moment on was with the Wallschiff in mind. The Wallschiff was seen by the master of the Pioneer and the passing signal was sounded while the vessels were a safe distance from each other and on non-collision courses. If those on the Wallschiff had been alert, the agreement for a starboard-to-starboard passage would have been established. The Trial Court found that there was an indication in the testimony that the Master of the Wallschiff was not aware of where he really was as he approached the Pioneer (Appendix A, 13a). It does not lie in the mouths of those representing a vessel which was obviously lost and which did not answer any signals to charge the other vessel with a failure to have sounded the signals earlier. Also, even if the validity of Coast Guard Pilot Rule 90.4 were conceded, the strange and completely unexplained silence on the part of the Wallschiff would have made the securing of a passing agreement impossible.

The importance of maintaining an adequate lookout is not disputed. The record herein fully supports the rulings below that such a lookout on the Pioneer was being kept. Two officers in the pilot and an unlicensed man on the bow all had the Wallschiff under observation. Even when the Wallschiff was below the Waterworks and the Pioneer was above the Blue Water Bridge the Wallschiff was close to the American shore and the situation then, as at the time when the two-blast signal was sounded, was a simple starboard-to-starboard passing, without complica-

tions. It remained so until the Wallschiff headed across the river and no prior intelligence transmitted to Captain O'Leary concerning the activities of the Wallschiff would have changed the situation one iota.

Even if a vigilant lookout is not being kept the failure to do so must have contributed to the collision before it has any significance. In *Compania De Maderas, etc., v. The Queenston Heights*, 220 F. (2d) 120, (C. C. A. 5) the failure to have a lookout on the bow was alleged as a fault which should condemn one of the vesseis. The Court below had, in fact, done so. In reversing that portion of the trial court's findings, the Court of Appeals said (p. 122):

> "From the undisputed testimony, we are of the opinion that the failure to have a lookout on the bow of the Star did not actively contribute to the cause of the collision. The finding to the contrary by the court below was clearly erroneous. The only relation to the collision of the position of the Star's lookout is speculation that, had the lookout been in the bow, he might have heard a prior two-blast signal, which the Queenston claims to have sounded one-half minute before the two-blast signal that the Star did hear, which prompted the Star's danger signal; and that, if such a prior signal had been heard, the Star might have been able to take some action to avoid the collision. *It is difficult to perceive what action the Star could have taken to avert the collision in view of the action on the part of the Queenston.*" * * * (Emphasis supplied.)

SUMMARY OF REASONS FOR DENYING THE WRIT.

This case is not one which requires the intervention of this Court. There are no principles nor rules of thumb to be laid down governing application of the Canadian rule of proportionate fault. The issues involved in this and cases of like nature are factual and the apportionment of fault varies with each case with the apportionment made by the trier of the facts usually accepted unless it has been arbitrarily and capriciously arrived at.

Even if the writ in this case were granted this Court could not establish standards which would be applicable to all cases arising under the above mentioned rule and the alleged public importance of this litigation has been grossly exaggerated.

If the principles of American law had been applicable the Pioneer would probably have been accorded complete exoneration. With two Courts having already ruled that the reckless navigation of the Wallschiff was the primary cause of the collision no sound reason has been advanced by the petitioners why this Court, contrary to its custom, should be required to examine the facts and weigh the testimony in this record.

CONCLUSION.

For the reasons stated the respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted.

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Office-Supreme Court, U.S.
FILED
AUG 22 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM 1961

No. 168.

PARTENREEDEREI "WALLSCHIFF", owner of the [illegible] and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, ET AL.,

Petitioners,

—against—

THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the Steamer Pioneer,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

PARTENREEDEREI "WALLSCHIFF", owner of the M V WALLSCHIFF, and AMERICAN SEATING COMPANY and AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *et al.*, *Petitioners,* —*against*— THE STEAMER PIONEER and THE CLEVELAND-CLIFFS IRON COMPANY, as bareboat chartered owner of the STEAMER PIONEER, *Respondents.*	No. 168.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents' brief in opposition to the petition concedes that this Court should review the apportionment of fault in a collision case where the apportionment is "arbitrary and capricious". It was indeed in the present case arbitrary and capricious for the Trial Court to allocate only 5% fault to the Pioneer, which failed, because of improper lookout, to observe the approaching Wallschiff until barely a minute before collision and which ignored the judicial, legislative, and administrative mandates to stop her engines and reverse until a passing agreement had been reached, than which "There is no more important rule", *J. H. Bull S. S. Co., v. United States*, 34 F. 2d 614, 616.

Respondent is incorrect in arguing that "The issues involved are ones of fact". The petition accepts the findings of fact of the Trial Court, which held that the Pioneer's master first realized that the Wallschiff was approaching when the vessels were only "about one half mile" apart (Appendix, p. 3a) and that the Pioneer continued on at full speed ahead, without a passing agreement, until the vessels were only 200 feet apart (Appendix, pp. 7a-7a). It is on these very facts found by the Trial Court that the Courts below should have held as a matter of law that the Pioneer was in gross violation of the requirements for safe navigation imposed by the Courts, by Congress, and by the Coast Guard.

Petitioners respectfully submit that to leave uncorrected the allocation of only 5% responsibility to the Pioneer in this proportionate fault case will result in circumvention of basic principles of United States Maritime Law, regarding the importance of obeying the Rules of the Road, because of misapprehension of the principles governing apportionment of fault in jurisdictions where that rule is applied. We respectfully submit that it is of particular importance that this Court correct the misapplication of Canadian law, in view of the growing commerce on the Great Lakes, now developing as the Fourth Seacoast of the United States.

August 21, 1961.

Respectfully submitted,

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